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ONE FOOT IN THE DOOR:  
EVIDENCE-BASED LIMITS ON THE LEGISLATIVE MANDATE

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(forthcoming in the peer-reviewed journal *Hukim*—Journal of Legislation, special issue on the  
work of J.Eule)

Abstract

*Legislative entrenchment or the long-term persistence of legislation has been associated with ineffective and obsolete laws. This position has nonetheless underestimated the natural bias towards the status quo that characterizes our legal order and the difficulty to terminate existing policies and laws. In this Article, I argue that the long-term stability of legislation only becomes a problem when it impedes the passage of new—and, in many cases, more effective—legislation. This Article aims to make two central contributions. First, it scrutinizes the legal and non-legal forces behind this problem. Second, it explains how temporary legislative measures should be employed to correct for the negative effects of legislative entrenchment. This Article suggests two ways in which these instruments may facilitate legislative reform. First, temporary legislative instruments (e.g., sunset clauses) can be employed as consensus-gathering mechanisms regarding legislative changes that might face initial opposition. Second, they can be employed as evidence-based mechanisms which promote research on available legislative alternatives. I contend that temporary legislative instruments such as sunset clauses, pilot programs, and state policy experiments should be used to produce evidence of the effectiveness of new legislation and rationalize the lawmaking process. This evidence-based approach can contribute to the disentanglement of ineffective legislation and operate as a counterweight against certain de facto entrenchment forces.*

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## INTRODUCTION

Julian Eule's seminal article "Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity" made a first serious attempt to explore the multiple dimensions of legislative continuity and in particular, of legislative entrenchment.<sup>2</sup> Eule scrutinized the phenomenon of legislative entrenchment and explained why the prohibition against retroactivity was rooted in the temporal limits placed on legislative power.<sup>3</sup> Until then, the long-term persistence of legislation had not occupied much of the legal literature.<sup>4</sup> Instead, the longevity of legislation was interpreted by civil law scholars as a pillar of the principle of legal certainty.<sup>5</sup> In the common law world, the analysis of legislative entrenchment had been lurking "beneath the surface the debates surrounding such issues as impairment of contract, legislative vetoes, budget-balancing legislation, constitutional amendment procedures".<sup>6</sup> Drawing on Eule's work, this article aims to contribute to this analysis by providing a more complete perspective on legislative entrenchment. This Article examines how temporary legislation, particularly sunset clauses and experimental legislation, might offer an evidence-based correction for the negative effects of the long-term persistence of legislation.<sup>7</sup> Sunset clauses, that is, dispositions that are terminated on a

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<sup>2</sup> Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379 (1987).

<sup>3</sup> See more recently FRANK FAGAN, *LAW AND THE LIMITS OF GOVERNMENT: TEMPORARY VS. PERMANENT LEGISLATION* (2013) (providing a law and economics analysis of the legislative process and analyzing the complexities of limiting the legislative mandate by employing sunset clauses).

<sup>4</sup> See also Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L. J. 189, 191 (1972); Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L. Q. 185, 196-201 (1986).

<sup>5</sup> See H. A. OLDENZIËL, *WETGEVING EN RECHTSZEKERHEID: EEN ONDERZOEK NAAR DE BIJDRAGE VAN HET LEGALITEITSVEREISTE AAN DE RECHTSZEKERHEID VAN DE BURGER* (1998); PATRICIA POPELIER, *RECHTSZEKERHEID ALS BEGINSEL VAN BEHOORLIJKE WETGEVING* (1997); For a comparative perspective see James R. Maxeiner, *Legal Certainty: A European Alternative to American Indeterminacy?*, 15 TULANE J. OF INT'L AND COMP. L. 541, 559-61 (2006).

<sup>6</sup> Eule, *supra* note 2 at 383.

<sup>7</sup> See also Tom Ginsburg, Jonathan S. Masur & Richard McAdams, *Libertarian Paternalism, Path Dependence,*

beforehand determined date and laws with a temporary and experimental character may assist the legislator in the task of exploring new and more effective legislative paths.<sup>8</sup>

The term “entrenchment,” that is, the process conducive to the long-term persistence of legislation, has received a negative connotation in the literature.<sup>9</sup> Nevertheless, the entrenchment of legislation is not necessarily a problem in itself as long as it does not stand in the way of legislative effectiveness and allows for the partial renewal of legislation in light of new policy, economic, and developments and evidence.<sup>10</sup> Legislative entrenchment becomes challenging when it impedes lawmakers from reforming ineffective laws and replacing them by evidence-based provisions. Therefore, the legislative mandate should be limited not only by future majorities as Eule suggested in 1986 but in particular by future evidence that shows that there are more effective responses to the underlying problem.

The literature has explained that social and bureaucratic entrenchment forces as well as path dependence might close the door to positive change and legislative reform.<sup>11</sup> In this article, I analyze this problem and argue that the use of temporary legislative instruments might help legislators “get one foot in the door” since they can be employed as consensus and evidence-gathering instruments.

This Article suggests two ways in which temporary instruments may facilitate legislative reform: first, temporary and experimental dispositions can operate as *consensus-gathering*

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*and Temporary Law*, 81 U. CHI. L. REV. 291 (2014) (arguing that temporary measures can be adequate instruments to disrupt path dependence and secure legislative or regulatory change).

<sup>8</sup> For a thorough analysis of the definition and history of sunset clauses, see ANTONIOS KOUROUTAKIS, *THE CONSTITUTIONAL VALUE OF SUNSET CLAUSES: A HISTORICAL AND NORMATIVE ANALYSIS* (2017).

<sup>9</sup> See Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L. J. 1665 (2002).

<sup>10</sup> Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L. J. 1665 (2002) (defending the constitutionality of legislative entrenchment and its potential benefits).

<sup>11</sup> Lily Kahng, *Path Dependence in Tax Subsidies*, 65 ALA. L. REV. 187 (2013) (arguing that tax subsidies for home sales rest upon questionable policy justifications, and contending that these questionable decisions are justified by path dependence and bounded rationality);

mechanisms regarding legislative changes that might face initial opposition; second, these instruments can be employed as *evidence-based* tools to initiate further research on novel legislative alternatives.<sup>12</sup> Temporary legislative instruments can be particularly useful to promote the partial renewal of legislation when there is initial aversion to policy or legislative termination. In these cases, sunset clauses, pilot programs, and experimental legislation may facilitate the gathering of consensus among those who oppose legislative reform because they “only” introduce temporary changes.<sup>13</sup> The enactment of temporary legislation offers a compromise between opposing views as these measures make the promise of temporality and renewed legislative oversight since they expire unless they are actively renewed.<sup>14</sup> The opponents of legislative reform often trust that legislative inertia and other forces will later reverse this temporary legislative change to the previous status (quo).<sup>15</sup>

Drawing on Ginsburg/Masur/Adams, I argue that temporary legislative measures can be used to disrupt existing legislative paths and institute new and evidence-based path-dependent institutions.<sup>16</sup> I acknowledge that this evidence-based approach also has its deficiencies and may be subject to political and interest groups capture.<sup>17</sup> Evidence-based instruments aim to offer an informed alternative path to existing legislation and, above all, a process to rationalize

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<sup>12</sup> Alvin E. Roth, *Introduction to Experimental Economics*, in HANDBOOK OF EXPERIMENTAL ECONOMICS 3 (Alvin E. Roth & John Kagel, eds., 1997) (arguing that lawmakers should “search for facts,” promote dialogues between politicians and theorists, and “whisper” the results of this process “in the ears of politicians.”).

<sup>13</sup> Richard C. Kearney, *Sunset: A Survey and Analysis of the State Experience*, PUB. ADMIN. REV. 49, 55 (1990); see also John Ip, *Sunset Clauses and Counterterrorism Legislation*, PUB. L. 74, 75 (2013) (analyzing the rationale of sunset clauses in the context of counterterrorism legislation).

<sup>14</sup> Tom Ginsburg, Jonathan S. Masur & Richard McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. 291 (2014) (arguing that temporary measures can be adequate instruments to disrupt path dependence and secure legislative or regulatory change).

<sup>15</sup> See, e.g., Forrest Maltzman & Charles R. Shipan, *Change, Continuity, and the Evolution of the Law*, 52 AM. J. POL. SCI. 252, 255 (2008) (describing sunset clauses as “substantial vehicles for encouraging a law to be revisited ... and build coalitions.”); see my previous work SOFIA RANCHORDÁS, CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION 194-195 (2014).

<sup>16</sup> Ginsburg, Masur & McAdams *supra* note 7

<sup>17</sup> See Mark A. Lemley, *Faith-based Intellectual Property*, 62 U.C.L.A. L. REV. 1328 (2015) (analyzing the complexities of the now widely available but often contradictory evidence on different aspects of IP law).

legislation, rather than a solution. This Article indicates the need for greater attention to evidence-based lawmaking,<sup>18</sup> that is, the development of a body of law based on facts gathered on a systematic basis in an attempt to find the most effective solution for a given problem.<sup>19</sup>

This article is organized as follows: in the first part, I provide a brief explanation of why laws last and become entrenched even when they are no longer effective. I then suggest a solution for this problem: the enactment of temporary legislative instruments. I explain why and how a temporary or experimental approach can correct for the negative effects of legislative entrenchment by explaining the functions of temporary instruments. In Part II, I provide an overview of these functions. In Part III, I underline the relevance of perceiving evidence as a limit to the legislative mandate, by examining the literature on evidence-based lawmaking. Part IV concludes with the potential shortcomings of this approach.

## I. WHY LAWS COME TO LAST

At first blush, the idea of longstanding statutes that are difficult to change appears to stand in deep contrast with the more recent discussions regarding the need to improve the quality of legislation and ensure that legislative provisions are based on sound evidence rather than determined by politics.<sup>20</sup> The legal literature has, nonetheless, not provided a thorough analysis of the factors conducive to the continuity of laws and their subsequent entrenchment or how to disentrench ineffective laws.

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<sup>18</sup> See my previous work Sofia Ranchordás, *The Whys and Woes of Experimental Legislation*, 1 THEORY & PRAC. OF LEGIS. 414 (2013).

<sup>19</sup> See generally CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT (2013); Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349 (2011); Jeffrey J. Rachlinski, *Evidence-based Law*, 96 CORNELL L. REV. 901 (2011).

<sup>20</sup> *Ibd.*

In this Part, I examine the main forces that determine the long-term persistence of legislation, I explain why legislative entrenchment can become a problem, and I introduce a possible corrective approach.

### A. *Entrenching a Statute*

The long-term persistence of legislation is commonly attributed to legislative inertia.<sup>21</sup> The process of entrenching a statute is nonetheless more complex as it results from a myriad of political or social forces that impede Congress from modifying an existing statute. The long-term persistence of legislation is often associated with the potential of statutes to establish a legacy and generate legal predictability.<sup>22</sup> In theory there are two set of legal and non-legal mechanisms that can be employed to achieve the long-term entrenchment of a statute: *de jure* or formal entrenchment provisions that limit explicitly the ability of the legislator to amend or repeal a statute (e.g., an eternity clause); and *de facto* entrenchment, that is, a set of social, political, and economic circumstances that make legislative reform difficult to operationalize in practice.

Formal or *de jure* legislative entrenchment refers to the persistence of legislation as a result of the enactment of either statutes or internal rules that limit future amendments, for example, by prescribing voting rules.<sup>23</sup> By precluding or limiting legislative change, legislative entrenchment evokes the image of the “dead hand of the law.”<sup>24</sup> This type of entrenchment is

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<sup>21</sup> Abbe R. Gluck, *Symposium Issue Introduction: The Law of Medicare and Medicaid at Fifty*, 15 YALE J. HEALTH POL’Y L. & ETHICS 1, 15 (2015) (mentioning “the well-known, institutionalized inertia of the legislative process. In the nation’s libertarian tradition, Congress is structured to make legislation difficult.”).

<sup>22</sup> Forrest Maltzman, Charles R. Shipan, *Change, Continuity, and the Evolution of the Law* 52 (2) AM. J. OF POL. SCI. 252 (2008).

<sup>23</sup> Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L. J. 1665, 1667 (2002).

<sup>24</sup> See, e.g., Yaniv Roznai, *Towards a Theory of Unamendability*, NYU Public Law and Legal Theory Working Paper (2015), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1515&context=nyu\\_plltwp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1515&context=nyu_plltwp); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 60 GEO. WASH. L. REV. 1127-1128; (1998), Michael J.



commonly accepted in constitutional documents but it is considered to be countermajoritarian when it is included in ordinary legislation.<sup>25</sup>

In practice, legislative entrenchment does not result from “dead legal forces” but rather from living legal and non-legal factors. As Professor Vermeule explained, while first degree murder rules have persisted longer than a number of laws and policies that are often qualified as entrenched statutes (*e.g.*, the 1965 Social Security Act establishing Medicaid and Medicare), this does not necessarily mean that the Congress’ hands are tied regarding the amendment of such rules. There are no signs here of *de jure* entrenchment clauses. In this case, those rules have remained because “people like them” and they are deemed to be still reasonably effective.<sup>26</sup> That is, the long-term persistence of legislation is not by itself a negative phenomenon as long as the core of this statute remains effective.

The “popularity” of a law is not the only reason why legislation might endure. In this Section, I refer to the role played by three entrenchment forces: path dependence, bureaucracy, and cognitive biases. In these cases, the long-term persistence of legislation is not motivated by the effectiveness of statutes but rather by cognitive biases and institutional obstacles.

## 1. Path Dependence

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Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 382 (1997); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008).

<sup>25</sup> For a thorough analysis of *de jure* entrenchment in the constitutional context, see YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS (2017).

<sup>26</sup> Vermeule, *supra* note 8 (“The reason, however, is not that such statutes are super or can be described as “constitutional” in any interesting or useful way. It is just that almost everyone wants there to be statutes against murder, so there is not and never will be a majority to repeal them. At a minimum, statutes that are *de facto* entrenched and statutes that rest on the support of (large) current majorities will be observationally equivalent in many cases.”)

Path dependence theory seeks to explain how the different phases of a historical process are connected.<sup>27</sup> It is a model developed in social sciences that explains how previous and current decisions and institutions influence past and future political and legislative decisions.<sup>28</sup> More than just resorting to the cliché that “history matters”, path dependence theory seeks to explain how the different phases of a historical process are connected.<sup>29</sup> According to this framework, different types of past and present inertia, vested interests, switching costs, and the notion of embeddedness tend to explain current and future minimal changes.<sup>30</sup> This is aggravated by the existence of procedural and institutional arrangements, the build-up of behavioral routines, and cognitive structures around existing institutions.<sup>31</sup>

Path dependence constrains future decisions because first, existing institutions (and networks of institutions) are crucial for the development of new solutions and reforms.<sup>32</sup> These institutions pave the way for the implementation of a policy and create the necessary conditions to establish, for example, a functioning health system. “Institutional stickiness” is an important pillar of the persistence of (particularly formal) institutions and public policies.<sup>33</sup> Institutions or

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<sup>27</sup> Dilan Riley & Juan Fernández, *Beyond Strong and Weak: Rethinking Postdictatorship Civil Societies*, 120(2) AM. J. OF SOC. 432, 503-493 (2014).

<sup>28</sup> In the economic literature, see, e.g., Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332 (1985); Paul A. David, *Why Are Institutions the 'Carriers of History': Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 STRUCTURAL CHANGE & ECON. DYNAMICS 205 (1994) (analyzing three insights that explain path dependence in economic phenomena: the role played by historical experience in forming mutually consistent expectations; resemblance between highly durable capital assets and the information channels and codes required by multi-person organizations, the interrelatedness among the constituent elements of complex human organizations and the constraints on choices about particular rules and procedures, resulting from pressures to maintain consistency and compatibility).

<sup>29</sup> Dilan Riley & Juan Fernández, *Beyond Strong and Weak: Rethinking Postdictatorship Civil Societies*, 120(2) AM. J. OF SOC. 432, 503-493 (2014).

<sup>30</sup> John Bell, *Path Dependence and Legal Development*, 87 TUL. L. REV. 787, 797. (2012); Page see *supra* note 146, at 88; Janet E. Frantz, *The High Cost of Policy Termination*, 20 INT'L J. OF PUB. ADMIN. 2097 (2007).

<sup>31</sup> See generally DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990).

<sup>32</sup> *Id.* at 67.

<sup>33</sup> Gerard Alexander, *Institutions, Path Dependence, and Democratic Consolidation*, 13 J. OF THEORETICAL POL. 249, 259 (2001) (arguing that formal institutions can be predictable platforms for democratic consolidation but emphasizing that “institutional stickiness” is not always present, since some formal institutions can be changed with simple legislative majority).

any other structures that frame a certain policy path simplify the decisionmaking process of citizens and politicians, by providing viable (even if suboptimal) alternatives.

Common law systems are known for their tendency to facilitate path dependence.<sup>34</sup> This path dependence means, for example, that past judicial decisions and legislation will shape or even determine present outcomes or decisions.<sup>35</sup> An important distinction between path dependence in economic markets, legislature, and courts is that the first can interrupt path dependent processes if a new set of economic conditions or political consensus emerge, whereas courts are more strongly dependent on existing judicial paths.<sup>36</sup> Path dependence theory has also been employed to explain the evolution of law beyond judicial lawmaking in a number of fields of law.<sup>37</sup>

Path dependence supports the argument that legal development is influenced not only by external social and economic forces but also by the internal and historical dynamic of the law.<sup>38</sup> When law is construed upon different legal institutions and small legal contributions, the theory of path dependence will sentence disruptive legal change to rejection—except under critical

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<sup>34</sup> Oliver Wendell Holmes, *The Path of the Law*, in OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 167, 186 (1920) (mentioning the tendency of common law to embrace path dependence). For a comparative legal study on the ‘slowness’ in legal change in civil and common law jurisdictions, see Rafael La Porta & Florencio Lopez-de-Silanes & Andrei Schleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285, 286-87 (2008) (arguing that “legal origins or the beliefs and ideologies become incorporated in legal rules, institutions, and education and are transmitted from one generation to the next”).

<sup>35</sup> Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 101, 104 (“Path dependence” means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it. It entails, in other words, a causal relationship between stages in a temporal sequence, with each stage strongly influencing the direction of the following stage.”).

<sup>36</sup> See Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 YALE J. INT’L L. 116, 121 (2010) (“a key difference between path dependence in courts, markets and legislatures is the existence of correctives. Both economic and political markets contain mechanisms to interrupt path-dependent processes; such mechanisms are much more limited in judicial systems”).

<sup>37</sup> Hathaway, *supra* note 35, at 106. (“The doctrine of stare decisis thus creates an explicitly path-dependent process. Later decisions rely on, and are constrained by, earlier decisions”); See, e.g., Lily Kahng, *Path Dependence in Tax Subsidies*, 65 ALA. L. REV. 187 (2013) (arguing that tax subsidies for home sales rest upon questionable policy justifications, and contending that these questionable decisions are justified by path dependence and bounded rationality); Amitai Aviram, *Path Dependence in the Development of Private Ordering*, 2014 MICH. ST. L. REV. 29 (2014). On judicial path dependence, see FRANCESCO PARISI, THE ECONOMICS OF LAWMAKING 97 (2009); Jef de Mot, *Bias in the Common Law*, in PRODUCTION OF LEGAL RULES 131, 138-139 (Francesco Parisi ed.) (discussing the bias towards the status quo on the grounds of the judicial path-dependence); Ginsburg, Masur & McAdams, *see supra* note 7, at 296 (arguing that temporary legislation may be preferable to permanent legislation in order to guarantee a transition from a path-dependent but suboptimal regulation to a more efficient outcome).

<sup>38</sup> Bell, *supra* note 30, at 787.

conditions, because the costs of legal change are greater than the benefits.<sup>39</sup> When a new problem arises, law does not start out with a blank slate, even when new phenomena arise. Instead, lawyers tend to fit them within existing categories.<sup>40</sup>

Considering the path-dependence constraint, policy and legislative changes tend to be incremental. In 1959, Charles Lindblom explained how policymakers “muddle through” new and old facts in order to formulate new policies, developing incremental changes and seeking more often consensus rather than, what we nowadays call, “evidence-based policies”.<sup>41</sup>

## 2. Bureaucracy

The negative impact of bureaucracy and red tape on the quality of legislation and policy has been well-documented in the legal literature.<sup>42</sup> Public policy and political science literature have also identified the connection between policy perpetuity and bureaucratic obstacles.<sup>43</sup> In this Section, I address the relationship between these insulation mechanisms and the longevity of legislation and policy programs.

Bureaucratic instruments are employed to insulate agencies, policy programs, and, to a certain extent, statutes from political pressure, political turnover, and new evidence. Empirical evidence has demonstrated that in the United States, agencies that have been insulated from

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<sup>39</sup> *Id.* at 790.

<sup>40</sup> *Id.* at 792.

<sup>41</sup> Charles E. Lindblom, *The Science of "Muddling Through"*, 19 PUB. ADMIN. REV. 79, 84 (1959). (“democracies change their policies almost entirely through incremental adjustments. Policy does not move in leaps and bounds.”)

<sup>42</sup> See, e.g., Martin Lodge, *High-Quality Regulation: Its Popularity, Its Tools, and Its Future*, 29 PUB. MONEY & MGMT. 145 (2009); Wim Voermans, *The Sisyphus Paradox of Cutting Red Tape and Managing Public Risk: The Dutch Case*, 4 UTRECHT L. REV. 128 (2008). See generally on the relationship between bureaucrats, politics, and lawmakers, CATHY MARIE JOHNSON, *THE DYNAMICS OF CONFLICT BETWEEN BUREAUCRATS AND LEGISLATORS* (1992).

<sup>43</sup> See, e.g., Robert P. Biller, *On Tolerating Policy and Organizational Termination: Some Design Considerations*, 7 POL’Y STUDIES 133 (1976); Garry D. Brewer, *Termination: Hard Choices—Harder Questions*, 38 PUB. ADMIN. REV. 338 (1978).

political turnover are substantially more durable than non-insulated agencies.<sup>44</sup> Independent agencies, that is, non-partisan agencies which are governed by administrators serving for fixed terms, are the typical example of politically insulated agencies.

Insulation from future politics and movements of change often implies the delegation of enforcement powers to agencies—particularly, independent agencies. This typically increases the probability of legislative entrenchment after elections. On the one hand, legal scholars have traditionally assumed that administrative agencies are durable and almost impossible to terminate.<sup>45</sup> The legislature controls agencies in the structure and process framework of their decisions by imposing procedural requirements that stack the deck in favor of certain interests.<sup>46</sup> These procedural requirements tend to endure. Political actors are then able to control the extent of representation of various interests in administrative process and stack the deck in favor of certain beneficiaries.<sup>47</sup> That is, Congress determines what decisions are made and when, by establishing the decisionmaking process at their outset. Deck stacking not only generates information and facilitates monitoring but it can also partially shelter policies from future repeals or amendment attempts.<sup>48</sup>

Besides delegation to independent agencies, other elements may also contribute to the political insulation of policy programs and the agencies implementing them. If legislation is

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<sup>44</sup> DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997* 157 (2003).

<sup>45</sup> See, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 309 (1979) (“Once an agency is established, its resources favor its own survival, and the longer agencies survive, the more likely they are to continue to survive.”).

<sup>46</sup> Jacob Gersen, *Designing Agencies*, in *RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW* 333, 342 (Daniel Farber & Anne J. O’Connell eds., 2010).

<sup>47</sup> Matthew McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. OF LAW, ECONOMICS & ORG. 243 (1987). See also Matthew McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1987).

<sup>48</sup> Patashnik & Zelizer, *supra* note 15 (“A major threat to a policy is that the coalition that enacted it may be replaced by a future coalition that opposes it. One solution is to “stack the deck” by creating institutions that make it harder to damage the program in the future.”).

sufficiently rich in substantive content, contains statutory deadlines, and opts for precise language, the predictability of agencies decisions, and the political control over the implementation of a statute might be extended in time.<sup>49</sup> In conclusion, the creation of bureaucratic obstacles that endure beyond the legislator that established them, is susceptible of impeding change as once an agency has been created and has achieved a certain degree of autonomy, the influence of political turnover or new evidence might impede legislative reform.

### 3. Cognitive biases

Resistance to legislative change is justified not only at the collective but also at the individual level in light of natural cognitive limitations and our natural human bias towards the status quo. Under uncertain conditions, social science literature has argued that people do not tend to update their preferences in light of incoming information and give preference to the solution they are familiar with.<sup>50</sup> Cognitive pathologies might occur in the legislative process, for example, when legislative actors resist to legislative change in virtue of cognitive biases, even when change is supported by empirical studies or is the most rational option. In the last decades, different theories of regulatory and legislative pathology have analyzed how legislation and regulation are made and what interests they serve.

Theories of cognitive psychology have demonstrated that regardless of how well-motivated human decisionmakers are, they are influenced by cognitive dissonances such as

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<sup>49</sup> See Cass Sunstein & Adrian Vermeule, *The Law of "Not Now,"* 103 GEO L. J. 157 (2014) (discussing the deferral of agency decisions in time).

<sup>50</sup> Jones, *supra* note 124, at 307 ("People are "incomplete Bayesians." In uncertain situations, they do not update their choices in light of incoming information about the probability of outcomes in the manner predicted by calculations from probability theory."). See generally Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOL. 341 (1983); Christine Jolls, Cass Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

existing reasoning paths and frameworks.<sup>51</sup> Cognitive dissonance is an important but overlooked element in the literature that can explain individual resistance to legislative change and consequently, the bias toward the status quo or path-dependent solutions.<sup>52</sup> The analysis of cognitive dissonance suggests that people resist change because “they attempt to be consistent with their attitude toward a known event.”<sup>53</sup> When they find themselves acting in a way that is inconsistent with their attitude, they experience tension and attempt to reduce this tension and return a state of cognitive consistency by resisting change.<sup>54</sup> This explains why individual lawmakers might resist to reform, even when confronted with a more effective legislative solution. This cognitive bias is another *de facto* entrenchment force that requires a thorough understanding of the cognitive limitations experienced by lawmakers.<sup>55</sup>

### *B. Why Legislative Entrenchment Can Be a Problem*

As the previous Section described, politics, path-dependent institutions, the need to maintain existing benefits or simply an individual bias towards the status quo can provide a partial explanation for the long-term persistence of legislation. Moreover, the process of terminating

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<sup>51</sup> William N. Eskridge & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616 (2002) (“cognitive psychology does not even constitute a body of learning telling us what agent will do; it only tells us that agents will fall short of whatever it is they pursued.”). *See also* Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness*, in JUDGMENT UNDER UNCERTAINTY. HEURISTICS AND BIASES 84 (Daniel Kahneman et al. eds., 1982).

<sup>52</sup> Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-making Capacity of Minors*, 48 EMORY L.J. 65 (1999) (arguing that legal commentators, politicians, and the public maintain positions on juvenile crime which are no longer supported by empirical evidence). *See also* Sara Sun Beale, *What' Law Got to Do with It? The Political, Social, Psychological and Non-Legal Factors*, 1 BUFF. CRIM. L. REV. 23 (1997) (discussing the disconnection between public opinion regarding criminal law and psychological and social research).

<sup>53</sup> *See* LEON FESTINGER, THE THEORY OF COGNITIVE DISSONANCE (1957); Elliot Aronson, *Dissonance theory: progress and problems*, in THEORIES OF COGNITIVE CONSISTENCY: A SOURCE BOOK (R. Abelson et al., eds, 1968).

<sup>54</sup> Johnny Jermias, *Cognitive Dissonance and Resistance to Change: the Influence of Commitment Confirmation and Feedback on Judgment Usefulness of Accounting Systems*, 26 ACCOUNTING, ORG. AND SOC. 141 (2001).

<sup>55</sup> *See* Andrew Jay McClung, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying*, 32 U.C. DAVIS L. REV. 389 (1991) (applying cognitive dissonance to police behavior and advocating the use of dissonance persuasion techniques already known in the treatment of substance abusers).

laws and policies involves considerable costs to prevent damage to local communities, institutions, employed staff, and constituencies.<sup>56</sup> The legal criticism of legislative entrenchment reveals nonetheless the underlying perspective that legal reform should favor the disappearance of law. The idea that each legislature should be free to legislate and amend almost every single piece of legislation is nonetheless unrealistic. In this context, it is important to inquire why legislative entrenchment should in some cases be qualified as a problem.

First, policy and legislative persistence becomes a “problem” when there are no rational reasons to maintain a policy in place.<sup>57</sup> This occurs, for example, when suboptimal policies are not timely terminated or when they become superfluous because the problem they aimed to address no longer exists.<sup>58</sup>

Second, the entrenchment of ordinary legislation becomes problematic when it constrains future majorities in a particular way against their will.<sup>59</sup> In the next Part, I propose a solution for this problem: the implementation of temporary legislative measures and suggest that these instruments can be “the one foot in the door” of legislative reform.

## II. THE ONE FOOT IN THE DOOR EFFECT

In this Part, I shed light on what I call “the one foot in the door effect”. This effect is a metaphor for the role played by temporary measures in the legislative process. Because they only promise temporary and reversible reforms, they facilitate the process of giving the first step to change the

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<sup>56</sup> See Janet E. Frantz, *The High Cost of Policy Termination*, 20 INT’L J. OF PUB. ADMIN. 2097 (2007) (discussing the costs of termination in the health care sector).

<sup>57</sup> Iris Geva-May, *When the Motto is ‘Till Death Do Us Part’: The Conceptualization and the Craft of Termination in the Public Policy Cycle*, 24 INT’L J. OF PUB. ADMIN. 263 (2001) (discussing the difficulty in terminating policies and the tendency of policies to persist).

<sup>58</sup> See MARK R. DANIELS, *TERMINATING PUBLIC PROGRAMS: AN AMERICAN POLITICAL PARADOX* 31 (1997).

<sup>59</sup> Dennis F. Thompson, *Democracy in Time: Popular Sovereignty and Temporal Representation* (2005) 12 CONSTELLATIONS 245, 255 (2005).



*status quo*. Once the first step is given, new entrenchment forces capture the new (albeit temporary) disposition. As this Part explains, this concept also translates a frequent reality in Parliaments: Sunset clauses are often passed, but rarely followed through.<sup>60</sup>

This Part examines the role of temporary legislation and experimental policymaking in promoting legislative and policy reform by explaining the typical functions of temporary legislative instruments and emphasizing how they have been employed in the recent past to gather consensus and overcome resistance to legislative reform. This Part starts with two illustrations of the “one foot in the door effect”: Kendra’s law and the USA Patriot Act. In both cases, new legislative measures were introduced on a temporary basis as a reaction to tragic events. These statutes survived more than a decade and were renewed several times.<sup>61</sup>

Temporary legislative measures such as sunset clauses and pilot programs were originally enacted in the 1970s to perform anti-entrenchment functions, that is, to terminate unnecessary and increasingly powerful agencies and their regulatory programs.<sup>62</sup> However, as this Part shows, temporary measures have been used in some cases either to disentrench suboptimal institutions and entrench new ones or to adopt new and rather controversial legislative reforms. Contrary to conventional wisdom, sunset clauses do not always tend to expire at the end of a certain period. Instead, they can be easily renewed and contribute to the long-term persistence of new and sometimes more effective legislation. When “one foot is in the door,” the presence of

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<sup>60</sup> See David A. Fahrenthold, *In Congress, Sunset Clauses Are Commonly Passed but Rarely Followed Through*, WASH. POST. (December 15, 2012), available at [http://www.washingtonpost.com/politics/in-congress-sunset-clauses-are-commonly-passed-but-rarely-followed-through/2012/12/15/9d8e3ee0-43b5-11e2-8e70-e1993528222d\\_story.html](http://www.washingtonpost.com/politics/in-congress-sunset-clauses-are-commonly-passed-but-rarely-followed-through/2012/12/15/9d8e3ee0-43b5-11e2-8e70-e1993528222d_story.html). (“Outdated laws were piling up. Bad ones weren’t being fixed. So lawmakers turned to ‘sunset clauses’ — expiration dates forcing Congress to reconsider old laws before they disappeared.”)

<sup>61</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001). Some of the dispositions of the USA Patriot Act were incorporated in the USA Freedom Act after the former finally expired in 2015.

<sup>62</sup> See Mark B. Bickle, *The National Sunset Movement*, 9 SETON HALL LEGIS. J. 209 (1985).

certain *de facto* entrenchment forces such as the ones analyzed in Part I might guarantee that the “door remains open.”

### A. Kendra’s Law

In 1999, Kendra’s law amended the New York Mental Hygiene Law and introduced forced outpatient treatment on a temporary basis.<sup>63</sup> The New York State created in this context the Assisted Outpatient Treatment Program, a new and temporary program authorizing court-ordered treatment for people with severe mental illness. This amendment was introduced following the brutal murder of Kendra Webdale who was pushed to an oncoming train by a psychiatric patient.<sup>64</sup> Although forty-five states nowadays permit assisted outpatient treatment of psychiatric patients, this approach has remained controversial in the medical community in the last decades.<sup>65</sup> The Medical Mental Association, the literature, and numerous activists have opposed this coerced treatment, arguing that Kendra’s law violates the autonomy of the mentally ill by imposing coercive treatment.<sup>66</sup> In 2010, a study also demonstrated that although assisted outpatient

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<sup>63</sup> N.Y. MENTAL HYG. § 9.60 (McKinney 2015).

<sup>64</sup> Ilissa L. Watnik, *A Constitutional Analysis of Kendra’s Law: New York’s Solution for Treatment of the Chronically*, 149 U. PA. L. REV. 1181 (2001).

<sup>65</sup> See Paul S. Appelbaum, *Assessing Kendra’s Law: Five Years of Outpatient Commitment in NY*, 56 PSYCHIATRIC SERVICES 791 (2005). Assisted outpatient treatment or outpatient commitment is court-ordered treatment (including medication) for individuals with severe mental illness who have a medical history of medication noncompliance. Assisted outpatient treatment is not allowed in five states: Connecticut, Massachusetts, New Mexico, Maryland, and Tennessee. Typically, violation of the court-ordered conditions can result in the individual being hospitalized for further treatment.

<sup>66</sup> See, e.g., Kristina M. Campbell, *Blurring the Lines of the Danger Zone: The Impact of Kendra’s Law on the Rights of the Nonviolent Mentally Ill*, 16 NOTRE DAME J. OF LAW, ETHICS & PUB. POL’Y 173, 180 (2002) (“The potential for abuse is made all the more likely because of the many individuals who may, under Kendra’s Law, petition for the involuntary outpatient commitment of a mentally ill person.”). Erin O’ Connor, *Is Kendra’s Law a Keeper? How Kendra’s Law Erodes Fundamental Rights of the Mentally Ill*, 11 J. L. & POL’Y 313 (2002); New York Civil Liberties Union, *Legislative Memo: Kendra’s Law Bills to Curtail Individual Liberty Unconstitutional*, NYCLU, <http://www.nyclu.org/content/legislative-memo-kendras-law-bills-curtail-individual-liberty-unconstitutional>. For an overview of the different perspectives, see Pam Belluck, *Program Compelling Outpatient Treatment for Mental Illness is Working, Study Says*, N.Y. TIMES, July 30, 2013, available at <http://www.nytimes.com/2013/07/30/us/program-compelling-outpatient-treatment-for-mental-illness-is-working->

treatment produces benefits for the community and the patients, there was insufficient evidence to support the expansion of the program.<sup>67</sup>

Kendra's law was originally due to sunset five years later but it was renewed on different occasions. This law was not in itself a novelty since it had been inspired by a similar pilot program that aimed to change the Mental Hygiene Law to include a form of forced outpatient treatment.<sup>68</sup> In the past decade, the renewal of the new and temporary section remained problematic, despite the several independent studies and evaluations of the effectiveness of Kendra's law partially counterbalancing the opposition with evidence of the benefits of this law.<sup>69</sup> In 2010, legislators were asked to make Kendra's law permanent, but the section of the N.Y. Mental Hygiene Law was only extended until 2015.<sup>70</sup> At the time of writing, Kendra's law is on the verge of becoming permanent with a new bill passed on March 26, 2018, by the New York State Senate.<sup>71</sup> In spite of the legal and medical controversies and the lack of consistent evidence regarding its effectiveness, the sun does not seem to set on Kendra's law.<sup>72</sup>

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study-says.html?\_r=0

<sup>67</sup> Jo C. Phelan & Marilyn Sinkewicz, *Effectiveness and Outcomes of Assisted Outpatient Treatment in New York State*, 61 PSYCHIATRIC SERVICES 137 (2010) ("Assisted outpatient treatment is a "package deal" that includes coerced treatment but also access to enhanced services. We cannot conclude which of these elements of the package deal contributed most to the generally positive outcomes for participants. We therefore caution against using our results to justify an expansion of coercion in psychiatric treatment.").

<sup>68</sup> Kristina M. Campbell, *Blurring the Lines of the Danger Zone: The Impact of Kendra's Law on the Rights of the Nonviolent Mentally Ill*, 16 NOTRE DAME J. OF LAW, ETHICS & PUB. POL'Y 173, 176-180 (2002) (comparing Kendra's law and the 1994 Pilot Program).

<sup>69</sup> MARVIN SWARTZ, HENRI SWANSON ET AL., NEW YORK STATE ASSISTED OUTPATIENT TREATMENT PROGRAM EVALUATION (2009), available at [http://www.macarthur.virginia.edu/aot\\_finalreport.pdf](http://www.macarthur.virginia.edu/aot_finalreport.pdf); Columbia Mailman School of Health, *Outpatient Care for Individuals with Severe Mental Illnesses Reduces Crime*, February 10, 2010, available at <https://www.mailman.columbia.edu/public-health-now/news/outpatient-care-individuals-severe-mental-illnesses-reduces-crime>. See also OFFICE OF MENTAL HEALTH, KENDRA'S LAW—FINAL REPORT ON THE STATUS OF ASSISTED OUTPATIENT TREATMENT (2005).

<sup>70</sup> The legislators' hesitation was motivated by the lack of clarity regarding the key issue of voluntary vs. involuntary psychiatric treatment and the troubling disparities in the law's implementation across the state.

<sup>71</sup> New York State Senate, Press Release: Senate Passes Measure to Make Kendra's Law Permanent, N.Y. State Senate, March 26, 2018, at <https://www.nysenate.gov/newsroom/press-releases/fred-akshar/32618-senate-passes-measure-make-kendras-law-permanent> (accessed on March 29, 2018).

<sup>72</sup> Mental Hygiene Law § 9.60 Assisted outpatient treatment. New York State Kendra's Law (due to sunset in 2015). See Kathryn A. Worthington, *Kendra's Law and the rights of the mentally ill: an empirical peek behind the courts' legal analysis and a suggested template for the New York State Legislator's reconsiderations for renewal in*

Kendra's law is not an isolated example of the reiterated renewal of temporary provisions. Rather, research has demonstrated that this was particularly common in the 1980s, when a "sunset boom" emerged in a number of states.<sup>73</sup>

### *B. USA Patriot Act*

The USA Patriot Act is an example of the power of political momentum, the dialectic of terror and emergency legislation, and the power of temporary legislative measures to trigger successive reauthorizations. At a time when a firm and rapid reaction to the September 11 attacks was required, the USA PATRIOT Act was "rushed" and passed in Congress without following the usual legislative procedure.<sup>74</sup> The necessity of the intrusive measures included in this act, their efficacy, costs and benefits were not analyzed on a systematic basis.<sup>75</sup> The USA Patriot Act was therefore accused of breaking with well-established legal paradigms and notions of checks and balances between the executive, judicial, and legislative branches of the government.<sup>76</sup> But its most controversial dispositions were temporary and invited future legislative oversight, convincing the most skeptical voters to accept the temporary measures.<sup>77</sup> If these measures

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2010, 19 CORNELL J. L. & PUB. POL'Y 213 (2010).

<sup>73</sup> See Ranchordás, *supra* note 15, at 20-21, 194-195 (2014). See also Landon Curry, *Politics of Sunset Review in Texas*, 50 PUB. ADMIN. REV. 58 (1990) (analyzing the "sunset boom" in the 1980s in a number of states and the frequent renewal of sunset clauses).

<sup>74</sup> Kim C. Wong, *The Making of the USA Patriot Act I: The Legislative Process and Dynamics*, 34 INT'L J. OF THE SOC. OF L. 179 (2006); see also Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145 (2004) (describing the lawmaking process of the USA Patriot Act).

<sup>75</sup> Kim C. Wong, *supra* note 74, at 179.

<sup>76</sup> Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA Patriot Act*, 80 DENV. U. L. REV. 375, 379 (2002) ("The Patriot Act attacks the balance between the government and the individual by a systematic circumvention of established doctrine and procedures guarding against unreasonable government intrusion.").

<sup>77</sup> Susan N. Herman, *The USA Patriot Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. 67, 68 (2006). See USA Patriot Act § 224(a) for a list of the Title II permanent provisions. Not surprisingly, the USA Patriot Act passed in the Senate on October 25, 2001 with a large majority, with Democrats and Republicans voting in favor of the bill.

would not be explicitly reauthorized, they would expire. This renewed reconsideration and legislative debate appear to convey the idea that sunset clauses reinforce political accountability and promote the separation of powers.<sup>78</sup>

A number of the USA Patriot Act sunset clauses were renewed or converted into permanent dispositions in the past decade.<sup>79</sup> In 2015, this process of renewals came to an apparent halt. On May 31<sup>st</sup>, 2015, a number of key provisions of the USA Patriot Act including the “lone wolf”, “roving wiretap” provisions, and section 215 expired.<sup>80</sup> This last one was particularly controversial since it authorized the NSA to collect the phone records of millions of U.S. citizens who were not suspects in terrorist activities. On May 31<sup>st</sup>, the Senate was not able to reach an agreement to avoid the expiration of these provisions and reauthorize them. The sunset provisions passed away in the midst of intense debate but they did not fall into oblivion. Rather, they lived on in the USA Freedom Act which was enacted in June 2015, showing that once the first foot is in the door, the way might be open.

### *C. Functions of Temporary Legislative Instruments*

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<sup>78</sup> Adam Klein, *The End of Al Qaeda? Rethinking the Legal End of the War on Terror*, 110 COLUM. L. REV. 1865, 1905 (2010).

<sup>79</sup> The USA Patriot Act was meant to be extinguished in 2005, but in 2005 some of its sections were converted into permanent ones, others were extended until 2010 by the USA Patriot Act Improvement and Reauthorization Act. See Christian van Stolk & Mihaly Fazekas, *How Evaluation Is Accommodated in Emergency Policy Making*, in EVALUATION AND TURBULENT 161 (Jan-Eric Furubo, Ray C. Rist, Sandra Speer, eds).

<sup>80</sup> See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 224, 115 Stat. 272, 295 (providing that various authorities granted by the Act expire on December 31, 2005). The temporary provisions are: sections 201 (wiretapping in terrorism cases), 202 (wiretapping in computer fraud and abuse felony cases), 203(b) (sharing wiretap information), 203(d) (sharing foreign intelligence information), 204 (Foreign Intelligence Surveillance Act (FISA) pen register/trap & trace exceptions), 206 (roving FISA wiretaps), 207 (duration of FISA surveillance of non-United States persons who are agents of a foreign power), 209 (seizure of voice-mail messages pursuant to warrants), 212 (emergency disclosure of electronic surveillance), 214 (FISA pen register/ trap and trace authority), 215 (FISA access to tangible items), 217 (interception of computer trespasser communications), 218 (purpose for FISA orders), 220 (nationwide service of search warrants for electronic evidence), 223 (civil liability and discipline for privacy violations), and 225 (provider immunity for FISA wiretap assistance).

In the last centuries, legislation is said to have lost “its dignity” in both common law and civil law jurisdictions.<sup>81</sup> In 1901, Simeon Baldwin famously declared that “statutes [had] no roots. [They] spring often from temporary emergency. They are hastily and inconsiderately adopted, and serving well or ill their immediate purpose, may fall into desuetude.”<sup>82</sup> As the previous examples show, not much has changed since then: both Kendra’s law and the USA Patriot Act have indeed stemmed from emergencies, resulting from defective lawmaking processes and lasted beyond the initial emergency that justified it.<sup>83</sup> Although many of its dispositions were originally meant to be temporary and introduced as novel, controversial, and extraordinary powers, they were renewed on several occasions. Similarly to other sunset clauses, after each renewal, the promise of temporality was made, giving the impression that these intrusive provisions would “hurt a little bit less”.<sup>84</sup> As the following sections explain, temporary legislative instruments are nonetheless meant to promote other legislative functions including offering prompt responses to emergencies and limiting extraordinary powers in time, achieving consensus regarding legislative reform, and gathering evidence.

## 1. Respond to Emergencies

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<sup>81</sup> JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999) (analyzing the reasons why legislation has been criticized in both common law and civil law jurisdictions, and offering a framework that attempts to reestablish its dignity).

<sup>82</sup> Simeon Baldwin, *Introduction*, in YALE LAW SCHOOL FACULTY, *TWO CENTURIES' GROWTH OF AMERICAN LAW, 1701-1901* at 1, 6 (1901).

<sup>83</sup> Adrian Vermeule, *Emergency Lawmaking After 9/11 and 7/7*, 75 U. CHI. L. REV. 1155 (2008) (the claim of defective process relies on the circumstances of emergency lawmaking.).

<sup>84</sup> Chris Mooney, *A Short History of Sunsets*, 2004 LEGAL AFF. 67, 68 (2004) (providing an overview of the use of sunset clauses since the 1980s and explaining that there is a tendency to renew sunset provisions and trying to use such clauses to gather the consensus of opponents: “once “a weapon for good-government reformers has been reduced to a spoonful of sugar that helps controversial legislation go down.”)

Sunset clauses have been typically employed in the context of emergency legislation to restrict extraordinary powers, promote legislative oversight and political accountability, and avoid that the “state of emergency” would be converted in a “state of normalcy.”<sup>85</sup> These are some of the rationales invoked to justify the inclusion of multiple sunset clauses in the USA Patriot Act enacted in the wake of the September 11 attacks.<sup>86</sup> Contrary to natural catastrophes or other crises that justify the enactment of emergency and temporary legislation, terrorism is not a temporary problem.<sup>87</sup> There are moments of higher and lower risk for a country, but terrorism is an old and enduring problem.<sup>88</sup> Nevertheless, the inclusion of sunset clauses in the USA Patriot Act influenced a number of countries in Europe to adopt temporary dispositions in the context of the 2008 financial crisis and in their counterterrorism policies.

## 2. Gather Consensus

Temporary legislative instruments can allow legislators to gather consensus by suggesting non-permanent solutions with the promise of policy reversibility. The adoption of sunset clauses postpones taking final decisions. Sunset clauses are thus a “snoozing button”<sup>89</sup> which first helps legislators replace old by new rules. However, if they are not followed through, they may contribute to the entrenchment of the new rule in the long-run. Since the threshold for enacting a

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<sup>85</sup> See Alan Greene, *Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Court of Human Rights* 12 GERMAN L. J. 1764 (2011).

<sup>86</sup> See John E. Finn, *Sunset clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation* 48 COLUM. J. OF TRANSNAT'L L. 442 (2010) (providing a thorough analysis of the use of sunset clauses in antiterrorism legislation).

<sup>87</sup> Stephen I. Vladeck, *Ludecke's Lengthening Shadow: The Disturbing Prospect of War without End*, 2 J. OF NAT'L SECURITY L. & POL'Y 53, 55 (2006) (“The ‘war’ on terrorism may never end. At a minimum, it shows no signs of ending any time soon.”)

<sup>88</sup> See BOB BRECHER, ET AL., DISCOURSES AND PRACTICES OF TERRORISM: INTERROGATING TERROR 3 (2010).

<sup>89</sup> See David A. Fahrenthold, *In Congress, Sunset Clauses Are Commonly Passed but Rarely Followed Through*, WASH. POST (December 15, 2012), available at [http://www.washingtonpost.com/politics/in-congress-sunset-clauses-are-commonly-passed-but-rarely-followed-through/2012/12/15/9d8e3ee0-43b5-11e2-8e70-e1993528222d\\_story.html](http://www.washingtonpost.com/politics/in-congress-sunset-clauses-are-commonly-passed-but-rarely-followed-through/2012/12/15/9d8e3ee0-43b5-11e2-8e70-e1993528222d_story.html)

temporary provision is usually lower than that of a lasting one, the opponents of a new provision tend to accept more easily legislative change.<sup>90</sup> From a theoretical point of view, this is a rational choice since if no legislative debate occurs, the provision will simply expire. Therefore, the most skeptical voters presuppose that legislative inertia, an entrenchment force, will impede the entrenchment of temporary and possibly excessive and controversial measures, unless they are renewed. In theory, this is a correct starting point but it assumes that any legislative renewal would presuppose an informed legislative debate. In practice, the renewal of temporary measures does not require much legislative effort. For example, the state practice with sunset clauses in the 1970s and 1980s shows that these provisions were easily renewed without a thorough evaluation.<sup>91</sup>

The use of sunset clauses has been however criticized in the literature. Inspired by political economy literature, commentators have argued that legislators that are mainly motivated by a short-run electoral horizon, will tend to adopt policy programs that produce positive short-term results, even if the long-term effects are not equally positive.<sup>92</sup> The use of sunset clauses may thus divide the costs of a policy, creating the illusion—in the eyes of citizens and political opponents—that the policy is not harmful to the federal budget nor is it predominantly driven by certain special interest groups.<sup>93</sup> Professor Rebecca Kysar has argued that, in the case of tax law, temporary legislation can create rent-seeking opportunities for certain interest groups and be

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<sup>90</sup> See Antonios Kouroutakis & Sofia Ranchordás, *Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies*, 25 MINN. J. OF INT'L L. 29 (2016).

<sup>91</sup> See Bickle *supra* note 62, at 223.

<sup>92</sup> Linda Cohen & Matthew Spitzer, *Term Limits*, 80 GEO. L. J. 477, 490 (1992).

<sup>93</sup> William G. Gale & Peter R. Orzag, *Sunsets in the Tax Code*, 99 TAX NOTES 1153, 1157 (2003); Cf. Gersen *supra* note 283, at 263 (arguing that sunset clauses do not misrepresent the total costs of legislation, instead sunset clauses simply require multiple rounds of enactment costs, which does not mean that the former will be more costly than the latter, since all laws must fulfill the same constitutional, legal and procedural enactment requirements and the respective costs).



used to reduce the estimated revenue costs since such calculation would only take the sunset period into account.<sup>94</sup>

### 3. Terminate Ineffective Policies – Empirical Evidence

There are few empirical studies on the value of temporary legislative instruments for policy termination.<sup>95</sup> The existing ones have demonstrated that sunset clauses can be used to introduce enhanced legislative flexibility, particularly in areas characterized by risks and uncertain conditions.<sup>96</sup> The implementation of sunset clauses has nonetheless proved to be challenging. In 2010, the Bertelsmann Stiftung conducted an empirical study analyzing the implementation of sunset clauses in the United States, Australia, Switzerland, and Germany.<sup>97</sup> Sunset clauses appeared to have been often employed in these countries to gather consensus regarding legislative and policy change and improve parliamentary control of regulatory policies. However, this study also found a tendency to renew these clauses, not always because of their superior effectiveness but because of the lack of adequate evaluations.<sup>98</sup>

A study conducted in the late 1980s also concluded that sunset clauses enacted at state level tended to be renewed on a regular basis. Multiple reasons explain this renewal, including

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<sup>94</sup> See Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007 (2011). Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 339 (2006) (arguing that in the case of the Bush tax cuts, sunset clauses were employed as “apparatuses that underestimate the revenue costs of legislation or fit the legislation within predetermined budget constraints.”).

<sup>95</sup> See, e.g., HERBERT KAUFFMAN, *ARE GOVERNMENT ORGANIZATIONS IMMORTAL?* (1976); Susan E. Kirkpatrick, James P. Lester & Mark R. Peterson, *The Policy Termination Process: A Conceptual Framework and Application to Revenue Sharing*, 16 POL’Y STUD. REV. 210 (1999). See also Arjen Boin, Sanneke Kuipers & Marco Steenbergen, *The Life and Death of Public Organizations: A Question of Institutional Design?*, 23 GOVERNANCE 385 (2010) (analyzing the termination of public institutions and arguing that while institutional design determines their shorter or longer life-span, these institutional characteristics also evolve over time).

<sup>96</sup> Ittai Bar-Siman-Tov, *Temporary Legislation, Better Regulation, and Experimentalist Governance: An Empirical Study*, \_ REG. & GOVERNANCE (forthcoming, 2018), <https://doi.org/10.1111/rego.12148>

<sup>97</sup> BERTELSMANN STIFTUNG, *SUNSET LEGISLATION AND BETTER REGULATION: EMPIRICAL EVIDENCE FROM FOUR COUNTRIES* (2010).

<sup>98</sup> BERTELSMANN STIFTUNG, *SUNSET LEGISLATION AND BETTER REGULATION: EMPIRICAL EVIDENCE FROM FOUR COUNTRIES* 21 (2010).

the difficulty to evaluate carefully all these clauses, considering their abundance and short duration periods.<sup>99</sup> More recently, Professor Jason Oh modelled the renewal of sunset clauses on different grounds, arguing that the renewal is often dependent on the underlying permanent policy and its acceptability to certain key legislative actors. According to this empirical study, the renewal or expiration of sunset clauses is explained by how the preferences of actors changed between the moment of enactment and the “sunset”.<sup>100</sup>

In brief, there are examples and empirical studies that show that sunset clauses have been used to introduce legislative change, particularly when it was difficult to gather initial consensus to change the status quo. This aspect of temporary legislation has also been analyzed extensively in the literature.<sup>101</sup> Temporary legislative measures have been used more or less successfully in different contexts and jurisdictions as consensus-finders. Although they promised a temporary solution which could be easily reverted, in many cases, these clauses were renewed. This is what this Article calls “the one foot in the door effect”. While it is true that the renewal of sunset clauses has at times revealed deficiencies in their implementation process, this does not mean that these measures should not be employed. As I have argued in my previous work, sunset clauses and other temporary legislative instruments are valuable instruments provided that they are enacted according to a clear framework and goals, are evaluated and reviewed on the grounds of the results of these evaluations.<sup>102</sup> As the next Section explains, temporary legislative instruments can be employed to help legislators introduce some flexibility in the lawmaking

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<sup>99</sup> Kearney, *supra* note 16, at 49.

<sup>100</sup> Jason S. Oh, *The Pivotal Politics of Temporary Legislation*, 100 IOWA L. REV. 1055, 1058 (2015) (modelling the renewal of temporary legislation on the preferences of key political pivots).

<sup>101</sup> See, e.g., Ginsburg, Masur, McAdams, *supra* note 7; Jacob Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247 (2007); Ozan Varol, *Temporary Constitutions*, 102 CAL L. REV. 409 (2014).

<sup>102</sup> Ranchordás, *supra* note 15.

process, test the effectiveness of new provisions, and initiate new legislative paths based on the gathered evidence.

#### 4. Gather Evidence

In this Article I suggest an evidence-based approach based on the use of temporary measures that disrupt path-dependent practices and help overcome stakeholders' resistance to change. Evidence of the effectiveness of new practices should ideally reeducate them, convince them to change their entrenched habits, and produce a "cooling effect" in politics and special interests.<sup>103</sup>

Kendra's law and the USA Patriot Act included sunset clauses, but there are many other temporary legislative and policy measures which can promote policy and legislative termination and create room for legislative renewal. This is the case of pilot programs, experimental policies, and experimental legislation. These instruments allow legislators and policymakers to gather evidence of the effectiveness of a new policy either by enabling experimentation through the derogation of existing provisions or by promoting policy variation or the creation of "states-as-laboratories". In federations, state policy experiments can contribute to the long-term stability of a federal program or statute because they allow states to accommodate the implementation of a federal statute to their local needs.<sup>104</sup> For example, in the past decades, states have conducted numerous experiments with Medicaid.<sup>105</sup> States applied for waivers so as to derogate from

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<sup>103</sup> Cass Sunstein, *Simpler: The Future of Functional Government*, BU Law's Symposium on America's Political Dysfunction: Constitutional Connections, Causes, and Cures, B.U. School of Law (Jan. 10, 2014), <http://www.bu.edu/law/news/sunstein.shtml>

<sup>104</sup> See generally on state experimentation Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L. J. 1673 (2011); Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 Emory L.J. 1333 (2009); Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 129 (2014).

<sup>105</sup> See Lawrence R. Jacobs & Timothy Callaghan, *Why States Expand Medicaid: Party, Resources, and History*, 38 J. OF HEALTH POL'Y L. 1023 (2013). See also Robert F. Rich, Cinthia L. Deye & Elizabeth Masur, *The*

federal rules and customize the implementation of Medicaid. This approach has been used not only to accommodate federalist concerns but also to allow states to innovate.

### III. EVIDENCE-BASED ENTRENCHMENT

As Cass Sunstein argues in his book *Simpler*, “pleading for empirical foundations seems obvious, as relying on sense rather than nonsense. But the temptation to favor intuition over information is strong.”<sup>106</sup> In addition to the tendency to favor intuition, the tendency to favor the status quo and vested interests, instead of scientific evidence is also strong. Moreover, legislative entrenchment and disentanglement can be legitimized by public participation: laws stay because “people like them”. But people do not always like the truth.

Evidence-based instruments can test whether entrenched rules and policies are the most effective ones. The purpose of evidence-based lawmaking is to “create better law—law informed by reality.”<sup>107</sup> “Evidence-based lawmaking” relies on an interdisciplinary and incrementalist approach to law that seeks effective and customized solutions for legal and policy problems.<sup>108</sup>

In this Part, I complete this Article’s approach to legislative entrenchment and legislative reform by arguing that laws should persist mainly because there is evidence that they “work.” I refer in this Part to the use of evidence as a limitation of the legislative mandate.

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*State Children’s Health Insurance Program: An Administrative Experiment in Federalism*, U. ILL. L. REV. 107 (2004).

<sup>106</sup> See Sunstein, *supra* note 19, at 5-6. See generally CASS R. SUNSTEIN & RICHARD H. THALER, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

<sup>107</sup> Rachlinski, *see supra* note 19, at 910.

<sup>108</sup> For a recent and thorough analysis of pragmatic incrementalism, see Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543 (2010).

### A. Evidence-based law

In the past decades, there has been a growing tendency to promote evidence-based practices in medicine, social services, education, and, more recently, in law.<sup>109</sup> Litigation, legal profession law, corporate law, criminal law, intellectual property law, and, not surprisingly, health law all want to become evidence-based.<sup>110</sup> The basic idea behind an evidence-based approach is that medical treatments, policies, and even legal provisions are expected to reflect the most effective solution for a problem. This perspective draws from the common understanding of evidence-based medicine as “the conscientious, explicit, and judicious use of current best evidence in making decisions about the care of individual patients.”<sup>111</sup>

Evidence-based practice is a paradigm or model that aims to replace the traditional intuitive,<sup>112</sup> experiential or opinion-based methodology by empirical evidence.<sup>113</sup> Evidence-based law and policymaking aims to use “the best available research and data on program results” and focus on “what works,” that is, it aims to enact laws and policies that incorporate the programs that have been positively evaluated. This approach is designed to reduce wasteful spending,

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<sup>109</sup> See, e.g., Laura K. Abel, *Evidence-based Access to Justice*, 13 U. PA. J. L. SOC. CHANGE 295 (2009) (analyzing the use of randomized trials in the improvement of the access to justice).

<sup>110</sup> See, e.g., Jeanne Charn, *Celebrating the “Null” Finding: Evidence-based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206 (2012) (arguing that evidence based strategies offer promise of more generous, effective, and consumer centered access to the legal system); J. Travis Laster, *Evidence-based Corporate Law*, 39 DELAWARE J. OF CORPORATE L. 67 (2014) (arguing that, at the resemblance of medicine, legislators could enact better laws if they would rely on available evidence of effectiveness; and similarly, judges would be able to “craft better decisions when evaluating the particular facts of a given case against a background of “how the world works.”); Jennifer E. Laurin, *Gideon by the Numbers: The Emergence of Evidence-based Practice in the Indigent Defense*, 12 OHIO ST. J. CRIM. L. 325 (2014) (analyzing the expansion of an evidence-based trend in indigent defense in three states—North Carolina, Texas, and New York—in which indigent defense oversight commissions have given priority to the development of evidence-based practice); Lemley, *supra* note 17 (analyzing the complexities of the now widely available but often contradictory evidence on different aspects of IP law).

<sup>111</sup> See David L. Sackett *et. al.*, *Evidence-Based Medicine: What It Is and What It Isn’t*, 312 BRIT. MED. J. 71, 71 (1996) (defining evidence-based medicine as “the conscientious, explicit, and judicious use of current best evidence in making decisions about the care of individual patients.”).

<sup>112</sup> See Carter L. Williams, *Evidence-Based Medicine in the Law Beyond Clinical Practice Guidelines: What Effect Will EBM Have on the Standard of Care?*, 61 WASH. & LEE L. REV. 479 (2004).

<sup>113</sup> Laurin, *supra* note 110, at 325.

expand successful programs (*e.g.*, new Medicare payment models delivering the best outcomes), and improve governmental accountability.<sup>114</sup>

In the context of law and policymaking, evidence-based practices have attempted to demonstrate the effectiveness of programs and laws by embracing comparative effectiveness research and different forms of legal experimentation including the implementation of pilot programs or the use of traditional state waivers. An evidence-based health care reform, for example, provides for a robust environment for comparative effectiveness research and systematic reviews. Evidence-based practices assist practitioners, policymakers, and legislators in the quest for answers for questions such as: Who will benefit from a new rule? Who might be harmed? Is this the most cost and quality effective treatment?<sup>115</sup>

Evidence-based lawmaking is a problem-solving approach to policy and legislation guided by the need to find the best available evidence for a problem. The reliance on evidence and expertise is far from being a novelty in law: experts have played for decades an important role in courts, assisting judges in their decisions regarding complex evidence.<sup>116</sup> With evidence-based practices legislators and agencies initiate a transition from relying on opinions, anecdote, external evidence and external expertise to the comparative study of effectiveness of policies and laws.

Comparative effectiveness research was until recently a technocratic research field. In the last years, research on comparative effectiveness emerged from the evidence-based medicine

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<sup>114</sup> PEW RESEARCH, LEGISLATING EVIDENCE-BASED POLICYMAKING: A LOOK AT STATE LAWS THAT SUPPORT DATA-DRIVEN DECISION-MAKING 2 (2015).

<sup>115</sup> See Mark Spottswood, *Evidence-based Litigation Reform*, 51 U. LOUISVILLE L. REV. 25 (2012).

<sup>116</sup> An important step in the direction of the reconciliation between science in the sense of evidence and law was given by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786 [1993]. (The Supreme Court decided in this case that trial judges should ensure the scientific merit of evidence that is entered into court, that is, the evidence should have “grounding in the methods and procedures of science.”)

movement.<sup>117</sup> Before the enactment of the ACA, section 804 of the American Recovery and Reinvestment Act of 2009 established the Federal Coordinating Council for Comparative Effectiveness Research essentially to coordinate comparative effectiveness research across the federal government.<sup>118</sup> The mission of this Council was to promote optimum coordination of research on health services.<sup>119</sup> Although this goal might sound reasonable at first blush, comparative effectiveness research has been regarded with suspicion as “the intriguing wild care of health care reform.”<sup>120</sup>

### *B. Temporary Legislative Instruments and Evidence Gathering*

In the context of health care reform in the United States, temporary measures such as pilot programs have been employed not only to introduce controversial and *ad hoc* provisions, but also and more importantly, to experiment with slow but effective changes in longstanding and path-dependent practices. To illustrate, the ACA has initiated several pilot programs to abandon the expensive and outdated fee-for-service concept in Medicare. The fee-for-service or traditional Medicare refers to the practice of reimbursing hospitals for their “reasonable costs” and physicians for their “reasonable charges” for all “medically necessary care.”<sup>121</sup> The ACA now requires the Secretary of Health of Human Services to “establish, test, and evaluate a five-year pilot program for integrated care” and directs the Secretary to issue recommendations

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<sup>117</sup> Eleanor DeArman Kinney, *The Real Truth about Death Panels: Comparative Effectiveness Research and Health Reform Legislation*, 36 OKLA. CITY U. L. REV. 667, 671 (2011).

<sup>118</sup> *Id.*, at 667.

<sup>119</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 804, 123 Stat. 115, 187-88 (codified at 42 U.S.C. § 299b-8 (2006 & Supp. III 2010)).

<sup>120</sup> Richard S. Saver, *Health Care Reform’s Wild Card: The Uncertain Effectiveness of Comparative Effectiveness Research*, 159 U. PA. L. REV. 2147 (2011).

<sup>121</sup> Social Security Amendments of 1965, Pub. L. No. 89-97, § 1862(a)(1).

regarding the expansion of this pilot program. In addition, the ACA has also opened the door to pilot testing of new “bundled payment models.”<sup>122</sup>

Pilot programs are temporary measures that are designed to test the effectiveness of a new policy. Pilot programs test different solutions for policy questions for which Congress does not have a definitive answer (*e.g.*, how to render health care organizations more accountable, how to reduce Medicare costs without affecting the quality of health care services or how to promote investment in primary care and innovation).<sup>123</sup> Pilot programs have been introduced for example to change the current Medicare payment system which is based on the inefficient fee-for-service. An example of this experimental use of pilot programs can be found in the National Pilot Program on Payment Bundling.<sup>124</sup> This pilot introduces a new approach to payment which aims to improve the coordination, quality, and efficiency of health care services. Instead of receiving individual payments for small services regarding the same condition (*e.g.*, a pneumonia or a hip replacement surgery), a subset of Medicare providers and health facilities will receive a single payment for an episode of acute care in a hospital, followed by post-acute care in another setting.<sup>125</sup> This will potentially avoid waste and discourage unnecessary and expensive services. Payments are therefore estimated beforehand based on expected costs for clinically episodes of care.<sup>126</sup> Bundled payment should include clear quality metrics focused on desired clinical outcomes that providers must achieve to maximize their payment.

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<sup>122</sup> Thomas L. Greaney, *Medicare Advantage, Accountable Care Organizations, and Traditional Medicare: Synchronization or Collision?*, 15 YALE J. HEALTH POL’Y L. & ETHICS 37, 40 (2015).

<sup>123</sup> Gluck *supra* note 21, at 1764.

<sup>124</sup> 42 US Code § 1395(c)(c).

<sup>125</sup> See Neeraj Sood, Peter J. Huckfeldt et al., *Medicare’s Bundled Payment Pilot for Acute and Postacute Care: Analysis and Recommendations on Where to Begin*, 30 HEALTH AFF. 1708 (2011) (analyzing the benefits and disadvantages of this pilot program and discussing its complex design).

<sup>126</sup> Suzanne Delbanco, *The Payment Reform Landscape: Bundled Payment*, 30 HEALTH AFF. BLOG (July 2, 2014), available at <http://healthaffairs.org/blog/2014/07/02/the-payment-reform-landscape-bundled-payment/>.



At first sight, the ACA seems to be a monolithic national policy which is impervious to change.<sup>127</sup> While this is not totally wrong, the ACA has created room for policy change, customization, and learning. With the ACA's State Innovation Waiver (§1332), commonly known as "2017 waivers" or "Wyden waivers," states are allowed to deviate from a number of key provisions of the ACA and experiment with their own solutions for health care spending.<sup>128</sup>

Waivers are instruments of congressional delegation of authority to the executive branch to authorize selective—and frequently experimental—deviations from the law.<sup>129</sup> Waivers are not incompatible with the entrenchment of the framework established by the ACA. Rather, these instruments are susceptible of gradually improving it by allowing states to try new policy alternatives that serve the same goals (and might even be more effective and efficient than the ACA), as long as they provide similar coverage. States can waive, for example, the individual mandate as prescribed in the ACA and enact instead an alternative that expands or narrows exemptions, increasing or decreasing penalties, or implementing a late-enrollment penalty.<sup>130</sup> These waivers are not a *carte blanche* to overturn the ACA. Instead, at the resemblance of the Medicaid waivers, states can use these waivers to design systems for expanding and delivering health care coverage that could look very different from the ACA. The federal government

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<sup>127</sup> Bob Semro, "Innovation Waivers" Allow States to Experiment, Try to Improve Upon ACA, HUFFINGTON POST (Feb. 12, 2015), [http://www.huffingtonpost.com/bob-semro/innovation-waivers-allow-states\\_b\\_6673768.html](http://www.huffingtonpost.com/bob-semro/innovation-waivers-allow-states_b_6673768.html).

<sup>128</sup> Marea B. Tumber, *The ACA's 2017 State Innovation Waiver: Is ERISA a Roadblock to Meaningful Healthcare Reform?*, 10 U. MASS. L. REV. 388 (2015) (arguing that the Employee Retirement Income Security Act of 1974 needs to be waived, amended or repealed so that states can experiment with new healthcare solutions).

<sup>129</sup> Frank J. Thompson & Courtney Burke, *Federalism by Waiver: MEDICAID and the Transformation of Long-Term Care*, 39 PUBLIUS: THE J. OF FEDERALISM 22 (2008). See also David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013) (analyzing in a federal setting big waivers, that is, delegation provisions that allow agencies to waive requirements that Congress has passed. In this context, Professors Barron and Rakoff argue that "once a statutory regime has become entrenched, a big waiver also permits the legislature to avoid the range of difficult political judgments that attend the possible revision or repeal of statutory rules that have attracted their own constituents and defenders and, in so doing, to grant the executive an important realm of discretionary authority."). Cf. Yair Sagy, *A Better Defense of Big Waiver: From James Landis to Louis Jaffe*, 98 MARQ. L. REV. 697 (2014) (arguing that big waivers are justified by a decentralized, inter-branch dialogic theory of regulation).

<sup>130</sup> Bob Semro, "Innovation Waivers" Allow States to Experiment, Try to Improve Upon ACA, HUFFINGTON POST (Feb. 12, 2015), [http://www.huffingtonpost.com/bob-semro/innovation-waivers-allow-states\\_b\\_6673768.html](http://www.huffingtonpost.com/bob-semro/innovation-waivers-allow-states_b_6673768.html)

would allow states to restructure their approach to health care reform by waiving and replacing some key provisions of the law.

State waivers and policy experiments are mirror images. Policy experimentation is a tool of policy analysis that allows states to test the effectiveness of a particular policy.<sup>131</sup> The idea that federalism enables experimentation and the pursuit of multiple learning opportunities is far from being recent. Justice Brandeis “states-as-laboratories” metaphor has been interpreted in the literature not only as a plea for federalism,<sup>132</sup> but also as a reflection of his hope on “scientifically based public policy.”<sup>133</sup> State experimentation is also potentially advantageous for states outside the experiment and even for the federal level since they can learn from the obtained results.<sup>134</sup> The federal level can also learn from state experiments and, to some extent, the ACA seems to have been based on the “Massachusetts experiment,” the health care legislation passed by the state in 2006, which created different health insurance pools.<sup>135</sup>

If states choose different policy approaches to manage the costs of quality and access to healthcare, then they might learn which approaches work and which do not. These simultaneous experiments generate information about the effects of certain health care solutions which would never be produced under a single and uniform single national policy.” According to the literature, modern state experimentation appears to reflect the pragmatism of John Dewey who

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<sup>131</sup> See Jenna Bednar, *Nudging Federalism towards Productive Experimentation*, 21 REGION’L & FED. STUD. 503, 506 (2011).

<sup>132</sup> See James Gardner, *The “States-as-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475 (1996) (arguing that “states-as-laboratories” was a praise of the American federalist system).

<sup>133</sup> See G. Alan Tarr, *Laboratories of Democracy? Brandeis, Federalism, and Scientific Management*, 31 J. OF FEDERALISM 37 (2001); Abigail R. Moncrieff & Eric Lee, *The Positive Case for Centralization in Health Care, Regulation: the Federalism Failures of the ACA*, 20 KAN. J. L. & PUB. POL’Y 266, 276 (2011).

<sup>134</sup> See Benjamin Beaton, *Walking the Federalist Tightrope: A National Policy of State Experimentation for Health Information Technology*, 108 COLUM. L. REV. 1670 (2008).

<sup>135</sup> See ANDREW KARCH, *DEMOCRATIC LABORATORIES: POLICY DIFFUSION AMONG AMERICAN STATES* 193 (2007).

perceived policy experimentation as a dynamic and evidence-based approach to public governance.<sup>136</sup>

Several states have used evidence-based strategies to promote the implementation of programs through the use of financial incentives, notably in the field of criminal law and policy, education, and health care reform.<sup>137</sup> An example is the Wisconsin Treatment Alternatives and Diversion program which funds alternatives to prosecution and incarceration of nonviolent offenders with histories of alcohol.<sup>138</sup> In some states, legislatures have gone beyond the mere use of funding instruments, requiring that certain state agencies implement only those programs that demonstrate at least a minimum standard of effectiveness.<sup>139</sup> To illustrate, in 2012, Michigan mandated that state departments of Community Health, Human Services, and Education to allocate funding to home visiting programs that have proven to be effective.<sup>140</sup>

### *C. Shortcomings of Evidence-Based Lawmaking*

Evidence-based policy and lawmaking has become highly politicized in the last years. Scholars had expected that this fact-based policy would have ideally helped finding a consensus between conservative and liberal analysts based on the available evidence rather than opinions or ideology. Instead, comparative effectiveness research has become “short-circuited, accelerated, and warped.”<sup>141</sup> Indeed, evidence-based lawmaking is not perfect. And it is not easy to practice.

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<sup>136</sup> Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL’Y REV. 261, 277-78 (2004).

<sup>137</sup> Pew Research, *supra* note 313, at 3-4.

<sup>138</sup> Wisconsin General Assembly, Act 25, 2005 Regular Session, 12, sec. 90m, <http://docs.legis.wisconsin.gov/2005/related/acts/25.pdf>.

<sup>139</sup> Pew Research, *supra* note 313, at 4.

<sup>140</sup> 8 Michigan Legislature, House Bill 5572, 2012 Regular Session, <http://www.legislature.mi.gov/documents/2011-2012/publicact/pdf/2012-PA-0291.pdf>.

<sup>141</sup> Gerber & Patashnik, *supra* note 27, at 2.

Evidence-based legislation involves the science of “muddling through” a vast amount of evidence. Both legislators and physicians need to rely here on frameworks in order to know what evidence should inform their judgments.<sup>142</sup> The legal literature has therefore cautioned against the excessive use of comparative effective research. Richard Saver has argued that the investment in this approach can prove to be costly and disappointing in the long-run because it does not insulate the obtained evidence from the pressure exerted by interest groups.<sup>143</sup> Moreover, in the specific case of health care reform, it is still unclear how the evidence of effectiveness will be used to transform legislation and improve the effectiveness of this area.<sup>144</sup> Ultimately, the success of this form of evidence-based approach might depend on the engagement of different political constituencies.<sup>145</sup>

In the specific case of state policy experimentation, it is clear that these experiments contain numerous caveats: these policy experiments are often not randomized,<sup>146</sup> they do not take place in a laboratory under controlled conditions, and they might not say much about causality.<sup>147</sup> The transplant of the lessons learned in a state might also not be possible, given the socioeconomic divergence between states.<sup>148</sup> In addition, state experimentation waivers have not always been used to test the effectiveness of new policies. Instead, states have employed state

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<sup>142</sup> John M. Eisenberg, *What Does Evidence Mean? Can the Law and Medicine Be Reconciled?*, 26 J. HEALTH POL. POL’Y & L. 369, 371 (2001) (comparing the use of evidence by physicians, lawyers and juries).

<sup>143</sup> Saver, *supra* note 319, at 2192.

<sup>144</sup> *Id.* at 2152-2153.

<sup>145</sup> *Id.*, at 2146.

<sup>146</sup> See Michael Abramowicz, Ian Ayres & Yair Listokin, *Randomizing Law*, 159 U. PA. L. REV. 929 (2011).

<sup>147</sup> Mark Carl Rom, *Taking the Brandeis Metaphor Seriously: Policy Experimentation within a Federal System*, in PROMOTING THE GENERAL WELFARE: NEW PERSPECTIVES ON GOVERNMENT 256, 259 (Alan S. Gerber & Eric M. Patashnik, eds., 2006).

<sup>148</sup> See David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541 (2008).

waivers to voice their dissenting positions, endangering the distributive objectives of federal welfare policies.<sup>149</sup>

In brief, pilot programs, state experimentation, and mandated evidence-based programs are just the beginning of a revolution in law and policymaking that aims to promote the entrenchment of core values and legislative frameworks while allowing for the gathering of evidence of the effectiveness of their different parts. While this evidence of effectiveness is still far from perfect, it can perhaps translate a shift in the paradigm of legislative entrenchment from faith-based law to evidence or science-based law.

#### IV. CONCLUSION

We know that we cannot trust numbers.<sup>150</sup> Empirical research and the general quest for evidence can also be easily biased. And for every number we find, someone will be willing to produce different ones. But evidence can constitute a more scientific limitation to the powers of legislative mandate than legislators' opinions and intuitions. At a time characterized by concerns regarding the proliferation of "fake news," the dismissal of science and the propagation of "alternative facts," evidence-based legislation is more needed than ever before. The gathered knowledge and evidence utilization are not solutions but rather incremental processes which naturally influence decision-making, even if they are not always actively used to change policies.<sup>151</sup>

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<sup>149</sup> See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014). See also John Dinan, *Shaping Health Reform: State Government Influence in the Patient Protection and Affordable Care Act*, 41 PUBLIUS: J. FED. 395 (2011).

<sup>150</sup> See Lemley, *supra* note 17.

<sup>151</sup> Claudio M. Radaelli, *The Role of Knowledge in the Policy Process*, 2 J. OF EUR. PUB. POL'Y 159, 160, 162 (1995) ("individuals and organizations will consistently gather more information than can be justified by real decision needs...Knowledge utilization is a more a process than a discrete event taking place at a specific time.")

This Article explained that, in some cases, evidence-based legislation is not introduced because there is a great deal of resistance towards novel—and, hopefully, more effective—legislative solutions. Drawing on the literature and the study of two cases, I argued that the adoption of temporary legislative instruments could offer a solution for these type of situations. Sunset clauses, pilot programs, and state policy experiments can promote reform by testing new legislative solutions and gathering evidence of their comparative effectiveness. They can be “the one foot in the door” in legal reform that allow the proponents of legislative change to advance policy reforms.

Considering the lack of empirical evidence, it is important to be cautious when generalizing the claims made in this Article. Temporary and experimental legislative instruments have in the past been employed to gather consensus among those who oppose legislative reform.<sup>152</sup> This compromise occurred because these measures offered by definition the promise of temporality and renewed legislative oversight. Nevertheless, as the renewal of temporary legislation becomes more common, their usefulness as “disrupters” of legislative entrenchment might become more reduced. Furthermore, the evidence-based approach developed in this article is not exempt from shortcomings. Sunset clauses, experimental policies and regulations, and pilot programs are not impermeable to political and interest groups capture.<sup>153</sup> Evidence-based instruments can be employed to question the effectiveness of entrenched paths, even if their adoption might open the door to the establishment of new long-term policies. This ability to embrace legislative change first on a temporary basis and then later on a more permanent basis is susceptible of promoting dialogue and stimulating the rationalization of legislation. This article

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<sup>152</sup> Richard C. Kearney, *Sunset: A Survey and Analysis of the State Experience*, PUB. ADMIN. REV. 49, 55 (1990); see also John Ip, *Sunset Clauses and Counterterrorism Legislation*, PUB. L. 74, 75 (2013) (analyzing the rationale of sunset clauses in the context of counterterrorism legislation).

<sup>153</sup> See Lemley supra note 17 at 1328 (analyzing the complexities of the now widely available but often contradictory evidence on different aspects of IP law).

offers therefore a contribution to this dialogue in an attempt to complement the legacy of the work of John Eule on legislative entrenchment.